IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 88 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1 to 5: No

COMMISSIONER OF INCOME-TAX

Versus

LILAVATI LALBHAI

Appearance:

MR BB NAIK for MR RP BHATT for Petitioner

MR J.P. SHAH for MR MANISH J SHAH for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

Date of decision: 19/11/98

ORAL JUDGEMENT (per R. Balia, J.)

On direction of this court, the Income Tax Appellate Tribunal, Ahmedabad Bench 'C', has submitted the statement of case and has referred the following question of law arising out of the Tribunal's order in I.T.A. No. 2224/Ahd/79 relating to A.Y. 1972-73.

"Whether, on the facts and in the circumstances of the case, the finding of the Appellate Tribunal that the land in question was agricultural land till it was sold and the surplus was not eligible to capital gains tax is correct in law and sustainable from the material on record?"

2. During the previous year relevant to A.Y. 1971-72, the assessee was assessed to capital gains in a sum of Rs. 1,59,323/- by holding that land admeasuring 4425 square yards situated at Asarwa was not an agricultural land. The order on appeal was set aside by the learned Appellate Assistant Commissioner by a common order for A.Y. 1967-68 and 1971-72. Raising the same issue in respect of a parcel of land, part of the same land which is in consideration was sold by the assessee during the previous year relevant to A.Y. 1967-68 and that too has been brought to capital gains by holding the same to be non-agricultural land. From the order of the A.A.C. it appears that on the earlier occasion the ITO has considered the lands to be non-agricultural solely on the ground that once the land sold fell within the Town Planning Scheme, the whole character of the land had to be taken as non-agricultural. The ITO also observed that no permission under sec. 63 of the Bombay Tenancy Act had been obtained prior to the sale because no permission was necessary as the land was situated within the municipal limits and meant only for non-agricultural use. On remand of this order, the ITO again held the land to be non-agricultural for both the A.Ys. 1967-68 and 1971-72. After remand, the ITO, by his order dated 28.1.78 had rejected the assessee's claim that land in question was agricultural land and not a capital asset within the meaning of the term and held the same to be a capital asset, transfer of which resulted in capital gains on two grounds. Firstly, as per the books of account of the assessee, negligible agricultural operations on the land were carried out. The assessment order goes to show that the accounts for the S.Y. ending S.Y. 2022 to S.Y. 2026 relating to A.Yrs. 1965-66 to 1771-72 which included both the assessment years were taken into consideration; that the area has been brought under Town Planning Scheme in 1966; that a part of land was sold to a housing society during the previous year relevant to A.Y. 1967-68. Secondly by referring to amendment brought in the definition of the term "capital asset" under sec. 2(14) of the Income-tax Act, 1961 so as to include agricultural lands situated within the limits of any municipality or cantonment area having population of 10,000 and above, held that provisions of

sec. 47(1)(viii) did not apply to the case of the assessee in respect of transfer in question by holding that though the sale deed was executed on 7.1.1970, it was registered on 28.4.70 and therefore the date of transfer of the land must be treated as 28.4.70 and not 7.1.70 so as to exclude the applicability of the amended definition for the purposes of bringing the transaction within the purview of capital asset notwithstanding the land being agricultural land. It appears that when appeal in respect of A.Y. 1971-72 came to be heard by learned AAC, the AAC had already decided appeal of the assessee in respect of A.Y. 1967-68. Relying on his decision in respect of A.Y. 1967-68, he affirmed the order of the Assessing Officer for the A.Y. 1971-72 also. In his short order the A.A.C. says,

> "A similar point arose for A.Y. 1967-68. The assessee has raised the same contentions as were raised for that assessment year. The ITO has also mentioned 8 contentions which were raised before him by the assessee. For the detailed reasons mentioned in that appellate order which are applicable to this assessment year also except for change of figures here and there, I hold that the ITO was justified in taxing the capital gains."

3. The Tribunal allowed the assessee's appeal No. ITA No. 2223/79 relating to A.Y. 1967-68 on 2.12.1980. When appeal for A.Y. 1971-72 came up for hearing before the Tribunal, the Tribunal too decided the appeal relating to A.Y. 1971-72 by holding that,

> "A similar point was taken in the appeal filed by the assessee for A.Y. 1967-68 which was dismissed by the Commissioner (Appeals). From the said order, however, the assessee preferred an appeal to the Tribunal and the Tribunal, by an order dated 2.12.80 in ITA No. 1223/Ahd/79 allowed the appeal of the assessee. For reasons stated in order of the Tribunal in ITA No. 2223/Ahd/79 allowed this appeal and directed the ITO to deduct Rs. 1,59,983/- from the total income of the assessee."

4. It further transpires that a reference application was made for the A.Y. 1967-68 by the C.I.T. which was granted by referring the question about nature of the land held by assessee to this Court which was registered as I.T.R. No. 22/84. This Court, by its

order dated 24.11.87, decided following 2 questions referred to it :-

"1. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal has been right in law in holding that the amount of Rs. 2,60,816/- being surplus on sale of lands was not chargeable to capital gains tax, since the lands subject-matter of sale were agricultural lands?

2. Whether the finding of the Appellate Tribunal that the lands subject matter of sale were agricultural lands and the surplus on a ale was not chargeable to capital gains tax is correction in law and sustainable from material on record?"

Holding that these issues are covered by ratio laid down by this court in CIT, Gujarat vs. Manilal Somnath, 106 ITR 917, Yashwanth R. Bhatt vs. CWT, 114 ITR 318 and Maganlal Morarbhai vs. CIT, Gujarat, 118 ITR 224 answered the two questions in favour of the assessee and against the Revenue; thus affirmed the finding that the lands in question were agricultural lands.
Obviously, this order of the High Court has come after the application of the Commissioner under Sec. 256(2) was granted by this court for submitting the statement of case and referring the questions of law arising out of the Tribunal's order for A.Y. 1971-72.

5. From the aforesaid facts it is apparent that the issue whether the land in question is agricultural land has invited consideration on identical facts and circumstances and identical grounds except to the extent of amendment in definition of capital asset since 1.4.1970 under section 2(14) of the Income Tax Act, which we shall presently refer throughout for both the A.Yrs. 1967-68 and 1971-72. Primarily the question whether the land on the basis of appreciation of material and surrounding circumstances can be said to be agricultural land is a question of fact. Judicial discipline demands that the same court ordinarily should draw the same inference on the identical facts unless there are grave reasons to deviate from the same and distance of time in deciding the questions of fact which arose simultaneously should not result in any different findings unless there is change of law or change of circumstances in between. When this Court had directed the Tribunal to refer the above questions the reference for earlier year was already pending and there was no reason to treat the question differently from later year in question. Though

finding in one assessment year does not operate as res judicata for the proceedings in subsequent year, we do not find any reason to deviate from this principle in the present case either.

6. Learned Counsel tried to urge that the A.Y. 1971-72 being at quite a distance from the earlier A.Y. 1967-68 there was a change in the nature of the land in question and therefore the finding relating to the A.Y. 1967-68 should not be ipso facto taken into consideration. On principle we do agree with the learned counsel that the circumstances may change and may result in alteration of the character of land from one character in a year to another character in another year but that again is a question of fact which requires leading of evidence on that issue about circumstance that have changed between the last finding and the period under consideration and determination of this question as of fact by the revenue authorities. The law is trite as to the limitation of jurisdiction while deciding issues of law under sec. 256 of the Income-tax Act, the court would not traverse beyond the question of law that arose out of the Tribunal's order and will not enter into enquiring new facts but will act on facts found by the Tribunal. From the entire proceedings we are unable to find that the question that nature of land has altered from agricultural to non-agricultural since A.Y. 1967-68 was ever raised or decided at any stage of the proceedings. At no point of time any of the Revenue authorities considered and decided the question about the change in the character of land at two different point of time. At the request of the learned counsel for the assessee we had gone through the entire order of the I.T.O. as the appellate orders have merely followed the earlier orders in respect of earlier assessment years. There is no suggestion that the question about change in character of land since first transaction was at all under consideration. In fact, in the first instance assessment for both the Assessment Years viz. 1967-68 and 1971-72 was set aside by the AAC on the ground that ITO has not examined material about user of land as agriculture and for that reason case was remanded. On remand the ITO, on examination of accounts of S.Y. 2020 to 2026, has reached his conclusion that land was not used for agricultural purpose. This finding is based on same material in both the cases inasmuch as the ITO in terms has stated while considering the case for 1971-72 that position in earlier years was no different. That is to say state of affairs about user of land for agricultural purposes for both Assessment Years was the same. This goes to show that finding for both years is

based on totality of all material which was same. That finding has been reversed in one case. The entire order of ITO does not reveal at any stage he was considering the question whether character of land has not remained the same since previous transaction. Thus, the question about change in the nature of land does not arise out of Tribunal's order, which may require consideration. We, therefore, decline to permit learned counsel for the revenue to raise this issue for the first time at this stage.

7. As we have noticed, the finding about nature of land is by considering that the land in question was registered in land records as agricultural land since 1943 and continued to be so until the year in question and agricultural operations were carried thereon by the assessee, though in small quantity, a finding of fact has been reached by final fact finding authority for A.Y. 1967-68, that is, the Tribunal, that it was an agricultural land and was confirmed by this Court. On same material same finding has again been reached by the Tribunal for the A.Y. 1971-72 in question. It cannot be said that finding is based on no material or on irrelevant consideration or on partly relevant and partly irrelevant consideration so as to stand vitiated. The fact that purchaser may use it or has actually used it for non-agricultural purpose, is not relevant for considering the nature of land in the hands of vendor. Relevant fact is whether the land in the hands of Vendor is agriculture or not and for that use of land to which it is to be put by his transferee subsequent to transfer is irrelevant. The finding, about nature of land is not liable to be interfered with on that ground.

The other ground that weighed with the ITO and the AAC to hold that even if land was agricultural in the hands of assessee, yet it was liable to tax because of change in law w.e.f. 1.4.1970 as a result of amendment in the definition of `capital asset' which included agricultural land in the definition of capital asset. The ITO has computed capital gains arising out of transfer of agricultural land, assuming it to be so, also on the ground that the land being situated within the municipal limits of Ahmedabad having a population of more than 10000 was a capital asset within the meaning of sec. 2(14) of the Income-tax Act and as the transfer took place in April 1970, the date on which document was registered, though it was executed on 7.1.1970, sec. 47(1)(viii) would not apply which excludes the applicability of sec. 45 to any transfer of agricultural land in India effected before the 1st day of March 1970.

It has been candidly stated by the learned counsel for the Revenue that in view of the decision of this court in Arundhati Balkrishna v. C.I.T., Gujarat, 138 ITR 245 which has in terms stated that the date for transfer of immovable property for the purposes of capital gains is the date when the sale deed was signed and executed and not when it was registered by applying the principle that on registration the transfer relates back to the date of execution of sale deed. Therefore, transfer of agricultural land in the present case took place on 7.1.1970 that is to say prior to 1.3.1970. It shall be goverened by exemption under Sec. 47(1)(viii). In view thereof, the consideration received as a result of transfer of land in question which is held to be agricultural, land cannot be brought to tax by reference to an amended definition of `capital asset' either.

8. As a result, we answer the question referred to us in the affirmative, that is to say, in favour of the assessee and against the Revenue. There shall be no order as to costs.

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